

Date of Hearing: April 24, 2012

ASSEMBLY COMMITTEE ON VETERANS AFFAIRS

Paul J. Cook, Chair

SB 921 (Lieu, Correa) – As Amended: April 16, 2012

SENATE VOTE: 33-0

SUBJECT: Military Department: Office of the Inspector General: California Military Whistleblower Protection Act.

SUMMARY: Creates a statutory requirement that there be a California Military Department Inspector General (Inspector General) and specifies many of his or her responsibilities. This bill contains an urgency provision. Specifically, this bill:

1. Makes the following findings and declarations:

- a. The Governor is the commander and chief of the state militia.
- b. The Military Department (Department) includes the office of the Adjutant General, the California National Guard, the State Military Reserve, the California Cadet Corps, and the Naval Militia.
- c. Within the Department, there currently exists an Inspector General, who inspects, audits, investigates, trains, and performs various duties necessary to support command functions and the mission of the Department.
- d. The Inspector General and the California Military Whistleblower Protection Act are intended to mirror federal law and regulations that govern federal Inspector Generals, specifically the Federal Inspector General Act of 1978 and the federal Military Whistleblower Protection Act. Members of the Department should be free to communicate and report waste, fraud, abuse of authority, violations of law, or threats to the public health and safety without fear of retribution.
- e. Public servants best serve the citizenry when they can be candid and honest without reservation in conducting the people's business.
- f. That Section 2 of the bill, imposes a limitation on the public's right of access to the meetings of public bodies or the writings of public officials and agencies within the meaning of Section 3 of Article I of the California Constitution. Pursuant to that constitutional provision, the Legislature makes the following findings to demonstrate the interest protected by this limitation and the need for protecting that interest:
 - i. In order to protect the confidentiality of those persons making complaints or allegations, as authorized by this act, from any form of retaliation for having made the complaint or allegation, it is in the state's interest to limit public access to information.

- g. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect.
2. Requires that the position of Inspector General shall satisfy all of the following requirements:
 - a. Be appointed by the Governor, with consideration of the recommendation of the Adjutant General, and shall serve at the discretion of the Governor;
 - b. Meet the same qualifications established in this code for the Assistant Adjutant General; and
 - c. Be subordinate to the Adjutant General and serve on state active duty at the grade of O-6 or higher.
3. Prohibits any person from serving as the Adjutant General or the Assistant Adjutant General for four years from the date of leaving the position of Inspector General.
4. Requires the Department to continue to fund the position of Inspector General.
5. Mandates that the Inspector General shall have access to all employees and documents of the Department.
6. Directs that the Inspector General may receive communications from any person, including, but not limited to, any member of the Department.
7. Requires the Inspector General to, at a minimum, continue to perform the functions of inspections, assistance, investigations, and teaching and training. The functions of the Inspector General shall be performed in accordance with applicable service laws, rules, and regulations governing federal inspectors general.
8. Mandates that the Inspector General shall continue to maintain a toll-free public telephone number and an Internet Web site to receive complaints and allegations. The Inspector General shall continue to post the telephone number and Internet Web site in clear view at every California National Guard armory, flight facility, airfield, or installation.
9. States that at the discretion of the Inspector General or the Adjutant General, or upon a written request by the Governor, a Member of the Legislature, any member of the Department, or any member of the public, the Inspector General may investigate any complaint or allegation regarding the following:
 - a. A violation of law, including, but not limited to, regulations, the Uniform Code of Military Justice (UCMJ), and any law prohibiting sexual harassment or unlawful discrimination.
 - b. Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specified danger to the public health or safety.

10. Specifies that if the Inspector General conducts an investigation at the request of a Member of the Legislature, the Inspector General shall submit to that member a report of his or her findings of that investigation. The report shall contain only information that may be lawfully disclosed, and shall contain, at a minimum, information regarding whether the complaint or allegations were unfounded or sustained.
 - a. A request described in the preceding paragraph is deemed not a public record and is not subject to disclosure under the California Public Records Act set forth in Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code.
11. Prohibits the Inspector General from disclosing to any person or entity the identity of a person making a written request or an allegation or complaint, unless the person making the request, allegation, or complaint has consented to the disclosure in writing.
12. Authorizes the Inspector General to refer to the Chief of the National Guard Bureau any complaints or allegations as specified, including any violations of the UCMJ, or any violations of any other state or federal law.
13. Permits the Inspector General to refer to the State Auditor any complaints, allegations, or violations of state or federal law.
14. Requires the Inspector General, in the event of a complaint, or allegation of misconduct regarding the Adjutant General or the Assistant Adjutant General, to immediately refer the matter to the Chief of the National Guard Bureau and the Governor for review.
15. Directs the Inspector General to conduct an investigation regarding the allegations concerning the Adjutant General or the Assistant Adjutant General concurrently with any federal investigation where appropriate and report the findings to the Governor.
16. Mandates that the Inspector General shall, on or before July 1, 2013, and on or before July 1 each year thereafter, submit a report to the Governor and the Legislature and specifies the contents of the report.
17. Entitles a specified new section of code the "California Military Whistleblower Protection Act."
18. Prohibits anyone from the following:
 - a. Restricting a member of the Department from communicating with a Member of Congress, the Governor, a Member of the Legislature, or any state or federal Inspector General. This prohibition does not apply to a communication that is unlawful.
 - b. Taking, or threatening to take, an unfavorable personnel action, or withholding, or threatening to withhold, a favorable personnel action, as a reprisal against a member of the Department for making a communication to any person, including, but not limited to, any of the following:

- i. A Member of Congress.
- ii. The Governor.
- iii. A Member of the Legislature.
- iv. The Inspector General.
- v. The State Auditor.
- vi. A federal Inspector General or any other Inspector General appointed under the Inspector General Act of 1978.
- vii. Any member of a Department of Defense audit, inspection, investigation, or law enforcement organization.
- viii. Any local, state, or federal law enforcement agency.
- ix. Any person or organization in the chain of command of the Department.
- x. Any other person or organization designated pursuant to regulation or any other established administrative procedures for such communications.

19. Requires the Inspector General to investigate complaints alleging the foregoing.

20. Directs the Inspector General receiving an allegation to do all of the following:

- a. Expeditiously determine whether there is sufficient evidence, in accordance with federal regulations governing federal inspectors general, to warrant an investigation of the allegation.
- b. Conduct a separate investigation of the information that the member making the allegation believes constitutes evidence of wrongdoing under both of the following circumstances:
 - i. There has not been a previous investigation.
 - ii. There has been a previous investigation but the Inspector General determines that the previous investigation was biased or otherwise inadequate.
 - iii. Upon determining that an investigation of an allegation is warranted, expeditiously investigate the allegation.

21. Specifies that if the Inspector General is not outside the immediate chain of command of both the member submitting the allegation and the individual or individuals alleged to have taken a prohibited personnel action, the Inspector General shall refer the allegation to the Chief of the National Guard Bureau and the Governor.

22. States that the Inspector General shall submit a report on the results of the investigation to the Adjutant General and a copy of the report on the results of the investigation to the member of the Department who made the allegation. The report shall be transmitted to the Adjutant General, and the copy of the report shall be transmitted to the member, not later than 30 days after the completion of the investigation.

- a. The report on the results of the investigation transmitted to the Adjutant General shall contain a thorough review of the facts and circumstances relevant to the allegation and the complaint or disclosure and shall include documents acquired during the course of the investigation, including summaries of interviews

conducted. The report may include a recommendation as to the disposition of the complaint.

23. Mandates that except for that information that is not required to be disclosed under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code, in the copy of the report transmitted to the member of the Department the Inspector General shall ensure the maximum disclosure of information that may be lawfully disclosed. The copy of the report need not, however, include summaries of interviews conducted, or any document acquired, during the course of the investigation. These items shall be transmitted to the member of the Department, if the member requests the items, with the copy of the report or after the transmittal to the member of the copy of the report, regardless of whether the request for those items is made before or after the copy of the report is transmitted to the member.
24. Directs that if, in the course of an investigation of an allegation under this section, the Inspector General determines that it is not possible to submit the report required by this subdivision within 180 days after the date of receipt of the allegation being investigated, the Inspector General shall provide to the Adjutant General and to the member making the allegation a notice of all of the following:
 - a. The reasons why the report may not be submitted within that time.
 - b. When the report will be submitted.
25. States that nothing in this article is intended to supersede the rights, benefits, processes, and procedures already afforded to members of the Department under existing law.
26. Requires the Department to provide, at a minimum, one training per year to the Department's civil service employees regarding the role and responsibility of the Inspector General and their rights under the CAWPA, the Military Whistleblower Protection Act, and any other relevant state or federal law.

EXISTING LAW:

1. The Inspector General Act of 1978 (IG Act) established a framework for federal inspectors general.
2. The Department of Defense (DoD) Inspector General (DoD IG) was established in 1982. According to the DoD IG, it "... combats fraud, waste and abuse in the Department of Defense by conducting audits and investigations."
3. DoD IG is authorized "to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to [any DoD component] which relate to programs and operations [of the Department of Defense]."
4. DoD IG may issue subpoenas for the production of documents, reports, answers, records, accounts, papers, and other data or documentary evidence necessary in the performance of the functions assigned to DoD IG by the IG Act. Additionally, DoD IG has been given

the authority to require testimony from any witness who is not currently a federal employee.

5. Pursuant to the federal Whistleblower Protection Act (USWPA), a federal employee authorized to take, direct others to take, recommend or approve any personnel action may not take, fail to take, or threaten to take any personnel action against an employee because of protected whistleblowing.
6. The DoD Office of Deputy Inspector General for Administrative Investigations Directorate for Whistleblower Reprisal Investigations (WRI) fulfills the statutory requirements to conduct and oversee allegations of whistleblower reprisal made by DoD Military Service members.
7. The California Whistleblower Protection Act (CAWPA) authorizes the California State Auditor to receive complaints from state employees and members of the public who wish to report an improper governmental activity. An "improper governmental activity" is defined as any action that violates the law, is economically wasteful, or involves gross misconduct, incompetency, or inefficiency.
 - a) After the State Auditor receives a complaint, any investigation resulting from the complaint is confidential. Information about the investigation will not be released until a report is issued by the State Auditor.
 - b) State employees who file a complaint are entitled to protection against retaliation by their employers for filing the complaint.

FISCAL EFFECT: Unknown. There is an existing state IG but the office is not statutorily mandated. Office is also currently in the chain of command.

COMMENTS: Department employees who wish to report waste, fraud, abuse, or otherwise "blow the whistle" have several avenues to do so under existing law and they are protected from reprisal when making such allegations. The proper avenue for complaint varies due to the multiple statuses which are possible for Department employees that may be subjects of a complaint and the unique nature of the Department. The proper system of justice/discipline also varies. In general, military members are subject to the UCMJ, while civilians are subject to progressive discipline and adverse personnel action.

As set forth above, there is federal law mandating a DoDIG. Though there is no statutory requirement to do so, the Military Department has created the Inspector General to handle complaints about certain status employees whose conduct would be outside the purview of the DoDIG.

The bill imposes a statutory requirement that there be an Inspector General and specifies many of his or her responsibilities. Though the Department has shown no intent to eliminate the position, if the bill passes, the Inspector General position will no longer be subject to elimination by the Department; it will be mandated through statute. The Inspector General would remain in the chain of command at the Department. However, as a safeguard against reduced independence, the Inspector General is a direct appointee of the Governor. In addition, the Inspector General is

prohibited from assuming the position of Adjutant General or Assistant Adjutant General for four years from the date of leaving the position of Inspector General.

The bill tries to mirror the multiple roles of the DoDIG in the Inspector General to the extent possible (investigation, education, training, assistance, etc.). The bill does not alter the applicability of the civil service system and UCMJ to personnel; UCMJ continues to apply to military personnel while the civil service system and State Personnel Board procedures apply to non-military personnel.

In the approximately eighteen months past there have been a substantial number of allegations of misconduct at the Department, allegations raised in multiple venues, including via the press, to legislators and staff, through formal complaints, and through whistleblower allegations, among others. These allegations raised serious concerns about the integrity of the Department. Some of these allegations involved personnel at the highest levels of the Department. A new Adjutant General has come aboard at the Department and instituted many changes and reforms with some of his top goals to restore any damage sustained to the reputation of the Department and redress previous missteps to the extent possible.

The bill is at least partially in response to the misconduct allegations raised in the previous paragraph. As set forth above, some of the allegations causing the greatest concern involved personnel at the highest levels of the Department. The bill directly addresses this particular situation, specifying a process for the Inspector General to use when allegations of misconduct involve the Adjutant General or the Assistant Adjutant General.

The bill reiterates the protections for those who make whistleblower complaints. In summary, personnel are permitted to make lawful communications when making whistleblower complaints and are protected from retaliation for doing so.

The bill also creates several reporting requirements so that complainants, the legislature and in some circumstances to the Governor are informed about the work of the Inspector General. The bill balances the need for reports on complaints with the privacy rights of those subject to investigation and those making complaints.

Finally, the bill imposes a new training requirement on the Department. It must educate civil service members of the Department annually regarding the role and responsibility of the Inspector General and the members' rights under the CAWPA, the Military Whistleblower Protection Act, and any other relevant state or federal law.

HISTORY:

Prior Legislation:

AB 2620 (Umberg, 2006)

AB 1445 (Umberg, 2005)

SB 37 (Maddy, Ch. 12, Stats. 1993).

AB 567 (Villines, Ch. 452, Stats. 2009)

Prior Vote: Senate Committee on Veterans Affairs (Ayes 7, Noes 0)

REGISTERED SUPPORT / OPPOSITION:

Support

None on file.

Opposition

None on file.

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